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Reconstructing First Amendment Doctrine: The 1990s (R)Evolution of the Central Hudson and O'Brien Tests

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by
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Introduction

For thirty years after its 1942 ruling in *Valentine v. Christensen*,[1] the United States Supreme Court generally held that commercial speech enjoyed no First Amendment protection.[2] Then, beginning in the mid-1970s with its rulings in *Bigelow v. Virginia*[3] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[4] the Court developed a commercial speech doctrine that afforded limited First Amendment protection to commercial speech because the Court perceived an inextricable link between such speech and regulable commercial transactions.[5] After 1980, the Court generally applied the analysis developed in *Central Hudson Gas and Electric Corporation v. Public Service Communication* to afford intermediate First Amendment protection of commercial speech.[6] Then, in the years following the Court's ruling in *Posadas de Puerto Rico v. Tourism Company*,[7] and even more noticeably in the latter half of the 1990s, the Court reshaped its *Central Hudson* analysis to imbue commercial speech with increased First Amendment protection.[8]

This is not the only change in the Court's First Amendment analysis during these years. In *United States v. O'Brien* in 1968, the Court distinguished between content-based laws and content-neutral laws and developed the test it subsequently applied to what it viewed as content-neutral, incidental regulations of speech.[9] The Court subjects content-based laws to strict scrutiny, but laws the Court

1. 316 U.S. 52 (1942).

2. *But see N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (extending First Amendment protection to political content in Civil Rights ad); *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 389 (1973) (suggesting that the First Amendment might protect legal commercial speech).

3. 421 U.S. 809 (1975).

4. 425 U.S. 748 (1976).

5. *See e.g.* Michael Hoefges & Milagros Rivera-Sanchez, *Vice Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis*, 22 Hastings Commun. & Ent. L.J. 343, 347 (2000) (noting that the Court for two decades has "tinkered" with its review of commercial speech).

6. 447 U.S. 557, 566 (1980).

7. 478 U.S. 328 (1986).

8. *See U.S. v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996); *Greater New Orleans Broad. Assn. v. U.S.*, 527 U.S. 173 (1999); Hoefges, *supra* n. 5, at 349 (concluding that Court decisions between 1995 and 1999 "elevated First Amendment protection for commercial speech to its highest level, approaching that of fully protected political and social speech").

9. 391 U.S. 367, 376 (1968).

determines are not directed to regulate speech and that do not discriminate against specific ideas or content are reviewed under the more lenient *O'Brien* test.[10] Since 1968, the Court has shifted its *O'Brien* intermediate scrutiny in two ways. First, the Court has broadened its use of the test to review laws that once would have faced – and failed – strict scrutiny.[11] Second, the Court has relaxed the standards imposed under *O'Brien* such that the test, at times, approaches the deferential standard of rational review applied to laws unrelated to freedom of speech.[12] By the 1990s, in fact, *O'Brien* intermediate scrutiny provided little First Amendment protection against a government regulation that could be said to advance a content-neutral goal, regardless of the law's actual motivation towards application on or effects on free speech.

This article begins with an introduction to the concept of intermediate scrutiny in First Amendment law, and then defines the *O'Brien*[13] test for content-neutral regulations of speech. The article outlines the Court's shifting and expanding application of *O'Brien* intermediate scrutiny. The article then addresses the *Central Hudson*[14] test for commercial speech and its changing character. Noting the original similarities between the *O'Brien* and *Central Hudson* tests, the article will focus on the disparate application of the two tests in

10. *See e.g. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*]; Michael W. Maseth, *The Erosion of First Amendment Protections of Speech and Press: The 'Must Carry' Provisions of the 1992 Cable Act*, 24 Cap. U.L. Rev. 423 (1995); Matthew D. Segal, *The First Amendment and Cable Television: Turner Broadcasting Sys. v. FCC*, 18 Harv. J.L. & Pub. Policy 916, 928 (1995) (noting that *Turner II* "appears to provide authority for avoiding strict scrutiny even when a statute on its face refers to content").

11. *See* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGeorge L. Rev. 69 (1997); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 299, 305 (1997) (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*], *Turner II*, 520 U.S. 180, and *44 Liquormart*, 517 U.S. 484, to support claim that "constitutional law is changing," calling the Court's review new, unprincipled, inconsistent and unpredictable, and asserting that intermediate scrutiny sometimes subjects laws "to minimal or no First Amendment scrutiny").

12. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49, 49 (2000) (attributing current "confused free speech analysis" to the development of the content-neutral doctrine); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 301 (1998) (endorsing the broad application of intermediate scrutiny while noting its "indeterminacy" and "vulnerab[ility] to manipulation by the Supreme Court"); Laurence H. Winer, *The Red Lion of Cable and Beyond?: Turner Broadcasting v. FCC*, 15 Cardozo Arts & Ent. L.J. 1, 28, 47, 64 (1997) (noting the Court's "subtle shift in language to facilitate its conclusion" that led to both "misguided characterization[s]" of laws and "major abridgements of free speech").

13. 391 U.S. 367.

14. 447 U.S. 557.

key decisions in the 1990s.

The analysis of the recent cases highlights a growing divergence between the Court's review of allegedly content-neutral regulations of the media and laws regulating commercial speech. Recent Court decisions suggest that, during the last years of the 20th Century, the Court simultaneously increased the rigor of its constitutional review of laws affecting commercial speech and reduced the rigor of its review of laws affecting the media. This article argues that, taken together, these two analytical shifts inverted the Court's time-honored First Amendment hierarchy and undermined the constitutional protection given to freedom of speech and the press. Indeed, the unprecedented elevation of First Amendment protection for commercial speech suggests that the Court may now view advertising not as an extension of commerce but as a vital source of information for an enlightened citizenry. The concurrent erosion of First Amendment protection for media may indicate that the Court is replacing the constitutional vision of a free press as central to a functioning democracy with a view of the press as just one more powerful, profitable business.

I
Intermediate Scrutiny

The United States Supreme Court has adopted a three-tiered approach to constitutional analysis whereby the Court increases its scrutiny of laws as their infringement upon fundamental rights increases.[15] Laws that directly limit fundamental constitutional rights are subject to strict scrutiny and must be narrowly tailored to advance a compelling government interest. In First Amendment jurisprudence, the Court has applied strict scrutiny to content-based laws that discriminate on the basis of viewpoint or content.[16] Content-neutral laws, which present a reduced risk of illicit government motives to suppress specific ideas, face intermediate scrutiny, a type of constrained balancing test.[17] Laws of general application that impose the most minor intrusions on speech are exposed to the

15. *See* Bhagwat, *supra* n. 11.

16. *See e.g. U.S. v. Playboy Ent. Group Inc.*, 529 U.S. 803, 812 (2000); *City of Erie v. Pap's AM*, 529 U.S. 277, 280 (2000); *Boos v. Barry*, 485 U.S. 312, 321 (1988).

17. *See e.g. Glickman v. Wileman Bros.*, 521 U.S. 457 (1997); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Board of Trustees v. Fox*, 115 S. Ct. 1585 (1995); *Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Pacific Gas & Elec. Co. v. St. Energy Resources Conservation & Dev. Commn.*, 461 U.S. 190 (1983).

minimal scrutiny of rational review.[18] A number of scholars have noted that strict scrutiny and rational review are "largely outcome determinative."[19]

Although the Supreme Court has applied intermediate scrutiny to a wide array of First Amendment cases, the Court has failed to articulate when this standard is applicable.[20] In fact, Justice Scalia's dissent in *Madsen v. Women's Health Center*, where the Court upheld no-protest buffer zones around abortion clinics, called intermediate scrutiny "some kind of default standard."[21] Three years earlier in *Leathers v. Medlock,* the Court applied rational review to affirm a state law taxing cable systems but exempting newspapers.[22] The Court said differential taxation of speakers, even members of the press, would not trigger heightened scrutiny unless the tax was directed to suppress particular viewpoints.[23] The Court suggested that the intent of the legislature was key to determining the applicable level of scrutiny.[24]

Yet, in its 1994 decision in *Turner I*, the Court identified three conditions that might trigger heightened or intermediate scrutiny of laws directed to achieve economic goals unrelated to speech but that incidentally infringed on speech.[25] Intermediate scrutiny is triggered, the Court said, when: 1) laws of general application differentially affect speakers,[26] 2) laws, even facially neutral laws, appear to be motivated by the desire to suppress certain ideas,[27] or when 3) a law's distinctions among media are not justified by "some special characteristic of the particular medium being regulated."[28] As applied in the Court's second, 1997 decision upholding cable regulations in *Turner Broadcasting System, Inc. v. FCC*, intermediate scrutiny "affords the government latitude in designing a regulatory solution"

18. *See Leathers v. Medlock*, 499 U.S. 439 (1991).

19. *See e.g.* Bhagwat, *supra* n. 11, *op. cit.* at 305.

20. Lexis/Nexis search Feb. 4, 2000, of United States Supreme Court cases, all available dates, using the keywords "atleast 3(heightened or intermediate) pre/3 scrutiny" found 55 cases; "atleast 3(heightened or intermediate) pre/3 review" found 24; "atleast 3(heightened or intermediate) pre/3 standard" found 38; and "atleast 3(heightened or intermediate) pre/3 test" found 2.

21. 512 U.S. 753, 792 (1994).

22. 499 U.S. at 453.

23. *Id.* at 447-49, 453.

24. *Id.* at 449.

25. 512 U.S. at 640, 660-61.

26. *Id.* at 640.

27. *Id.* at 660.

28. *Id.* at 660-61.

and enables it to "employ the means of its choosing so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest."[29]

Furthermore, rather than delineate the rigor of intermediate scrutiny when it is applied, the Court equivocated in *Nixon v. Shrink Missouri Government PAC*.[30] The Court in 2000 upheld limits on campaign contributions and stated, "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[31]

II
Content Neutrality and the *O'Brien* Test

The concept of content-neutral regulation of speech and the media emerged in the 1960s and 1970s. Based on analogy to zoning laws, the doctrine of content neutrality grew from symbolic speech cases and presumed that the regulation of the time, location, and circumstance (particularly the volume) of speech raised few concerns about censorship or distortion of the marketplace of ideas.[32] Thus, content-neutral laws need not be reviewed under the strict scrutiny applied to laws that directly distort the exchange of ideas.

The United States Supreme Court apparently first mentioned regulations that are "neutral with respect to content of the speech involved" in its 1967 decision in *Curtis Publishing Co. v. Butts*.[33] In *Curtis Publishing*, the Court upheld a libel verdict and punitive damages under an actual malice standard, stating that "ideologically neutral, and generally applicable regulatory measures [may] be applied to publication[s]."[34] The Court stated, "Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of

29. 520 U.S. at 213 (internal quotations and citations omitted).

30. 528 U.S. 377 (2000).

31. *Id.* at 391.

32. *See e.g. Young v. Am. Mini Theatres*, 417 U.S. 5 (1976) (proscribing laws that "slip from the neutrality of time, place, and circumstance into concern with content").

33. 388 U.S. 130 (1967) (This case is the first one discovered through a Lexis/Nexis search using the keywords "neutral w/5 content and atleast 5(speech).").

34. *Id.* at 152 (referencing *N.Y. Times Co.*, 376 U.S. 254).

information and those of individuals seeking recompense for harm."[35]

The next year, in *United States v. O'Brien*, the Court refused to overturn a conviction for draft-card burning and established the intermediate scrutiny test for content-neutral laws that incidentally infringe symbolic speech.[36] While recognizing the symbolic meaning of draft-card burning as protest of the Vietnam War,[37] the Court nonetheless affirmed the federal government's power to prohibit the destruction of military draft registration documents. The Court in *O'Brien* emphasized the facial neutrality of the statute and concluded that it was a permissible regulation of conduct that imposed only an incidental burden on speech. The statute was constitutional, the Court said, because it

> [did] not distinguish between public and private destruction, and it [did] not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.[38]

In reaching its decision in *O'Brien,* the Court said the content-neutral regulation of the non-speech elements of conduct that combines both speech and action is sufficiently justified:

> [1] if [the regulation] is within the constitutional power of the Government;
> [2] if [the regulation] furthers an important or substantial governmental interest;
> [3] if the governmental interest is unrelated to the suppression of free expression; and
> [4] if the incidental restriction on alleged First Amendment

35. *Id.* at 153.

36. 391 U.S. 367.

37. The Court generally has found that regulation of symbolic speech, or speech acts, is less offensive to the Constitution than is regulation of pure speech. *See e.g. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) [hereinafter *CCNV*]; *Tex. v. Johnson*, 491 U.S. 397, 406 (1989); *Bd. of Trustees of St. U. of N.Y. v. Fox*, 492 U.S. 469, 477, 478 (1989) (confirming "that the validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place, or manner restrictions"); *Edge Broad. Co.*, 509 U.S. 418.

38. *O'Brien*, 391 U.S. at 375 (internal citation omitted).

> freedoms is no greater than is essential to the furtherance of that interest.[39]

The Court rejected the notion that the statute had any unconstitutional effect.[40] The Court also refused to determine whether Congress intended the statute to punish the expression of disfavored ideas (the defining factor of content-based laws subject to strict scrutiny).[41] The Court said, "[I]t is a familiar principle of Constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[42]

III
O'Brien – Expanding Application, Shifting Standards

A. Expanding Application

The *O'Brien* Court's intermediate scrutiny test was initially restricted to marginal areas of "alleged First Amendment freedom,"[43] such as symbolic speech. The *O'Brien* test was later applied or referenced by the Court in more than 100 decisions involving issues such as compelled commercial speech,[44] regulation of cable,[45] participation in privately sponsored parades,[46] distribution and solicitation of financial support for religious materials,[47] flag burning,[48] cross burning,[49] billboard regulation,[50] sentencing enhancement,[51]

39. *Id.* at 377.
40. *Id.* at 385.
41. *Id.* at 383.
42. *Id.*
43. *Id.* at 377 (This key phrase is cited in only 17 subsequent Supreme Court rulings referencing *O'Brien.*); *see e.g. Barnes v. Glen Theater*, 501 U.S. 560 (1991); *Acara v. Cloud Books*, 478 U.S. 687 (1986); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1972); *Healy v. James*, 408 U.S. 169 (1972)).
44. *Glickman*, 521 U.S. 457; *Fox*, 115 S. Ct. 1585; *Pacific Gas & Elec. Co.*, 461 U.S. 190.
45. *Turner II*, 520 U.S. 180; *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996).
46. *Hurley*, 515 U.S. 557.
47. *Society for Krishna Consciousness*, 505 U.S. 672.
48. *Johnson*, 491 U.S. 397.
49. *RAV v. St. Paul*, 505 U.S. 377 (1992).
50. *Columbia v. Omni Outdoor Advert.*, 499 U.S. 365 (1990).
51. *Wisc. v. Mitchell*, 508 U.S. 476 (1993).

public forums,[52] forced closure of an adult bookstore,[53] picketing,[54] taxation,[55] signage,[56] and news rack placement.[57]

For example, in *Grayned v. The City of Rockford*, decided in 1972, the Court upheld a law that prohibited "disruptive" speech and assemblies outside schools during school hours. [58] The Court in *Grayned* struck down an anti-picketing ordinance that impermissibly distinguished between labor picketing and other peaceful picketing but held that the anti-noise ordinance was neither unconstitutionally vague nor unconstitutionally overbroad.[59] The Court subjected the city ordinance to intermediate scrutiny, as a content-neutral regulation of the time, place and manner of expression.[60] "The crucial question," the Court said, "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[61]

In 1976, in *Buckley v. Valeo*, the Court applied *O'Brien* to strike down regulations on campaign spending but to uphold contribution limits.[62] The Court acknowledged the vital role of campaign finance to the exchange of political ideas but said the regulations were "directed toward the spending of money, [which] introduces a nonspeech element."[63] The Court held that the regulations were "neutral as to the ideas expressed."[64] Additionally, Justice White, in his concurring opinion, found that the regulations were also "neutral as to the content of speech and not motivated by fear of the consequences of the political speech of particular candidates or of political speech in general."[65] Nevertheless, the Court struck down the spending limits as overly invasive of speech.[66]

In a partial dissent, Justice Marshall looked to the effect, rather

52. *U.S. v. Kokinda*, 497 U.S. 720 (1990).
53. *Cloud Books*, 478 U.S. 697.
54. *Carey v. Brown*, 447 U.S. 445 (1980); *but see Madsen*, 512 U.S. 753.
55. *Leathers*, 499 U.S. 439; *Minneapolis Star & Tribune Co. v. Minn. Commr. of Rev.*, 460 U.S. 575 (1983).
56. *Boos*, 485 U.S. 312; *but see City of Ladue v. Gilleo*, 512 U.S. 43 (1994).
57. *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).
58. 408 U.S. 104 (1972).
59. *Id.* at 109.
60. *Id.* at 115, 121.
61. *Id.* at 116.
62. 424 U.S. at 58.
63. *Id.* at 65.
64. *Id.* at 39.
65. *Id.* at 259-60 (White, J., concurring in part and dissenting in part).
66. *Id.* at 58. For a recent application of the Court's analysis of campaign contribution under *Buckley*, consult *Nixon*, 528 U.S. 377.

than the facial neutrality, of the provisions. He wrote:

> While the limitations on contributions are neutral in the sense that all candidates are foreclosed from accepting large contributions, there can be no question that large contributions generally mean more to the candidate without a substantial personal fortune to spend on his campaign. Large contributions are the less wealthy candidate's only hope of countering the wealthy candidate's immediate access to substantial sums of money. With that option removed, the less wealthy candidate is without the means to match the large initial expenditures of money of which the wealthy candidate is capable. In short, the limitations on contributions put a premium on a candidate's personal wealth.[67]

In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court struck down a California regulation requiring public utilities to provide space in their billing envelopes to organizations wishing to argue against the utilities' messages.[68] Applying the *O'Brien* test for content-neutral regulations, the Court held in 1986 that the California regulation unconstitutionally distorted the marketplace of ideas because it "does not equally constrain both sides of the debate about utility regulation."[69]

Based on effect analysis, however, the Court subsequently held that a regulation that facially "does not favor either side of a political controversy" might be impermissible if it "prohibit[s] public discussion of an entire topic."[70] Thus, in the 1988 case of *Boos v. Barry,* the Court struck down a provision prohibiting critical signs or displays outside foreign embassies.[71] The Court reasoned that the legislature had impermissibly justified the provision by references to "content" and "focus[ed] on the direct impact of speech on its audience."[72]

The Court has also applied the *O'Brien* test to uphold laws that single out adult theaters on the basis of the content of their programming.[73] The Court has said the regulation of adult theaters is

67. *Id.* at 288 (Marshall, J., concurring in part and dissenting in part).
68. 475 U.S. 1 (1986).
69. *Id.* at 14.
70. *Boos*, 485 U.S. at 319.
71. *Id.* at 321.
72. *Id.* at 320-21.
73. *See e.g. City of Renton v. Playtime Theatres*, 475 U.S. 41, 56 (1986); *but see id.* at 55 (Brennan, J., dissenting) (calling the content-neutral label "patently flawed" because

a content-neutral restriction on the conduct-like "secondary effects" of these businesses and is therefore not content based.[74]

B. Shifting Standards

As the Court applied the *O'Brien* test to a growing diversity of fact scenarios, the Court also changed the language of the test. In 1984, the Court reframed prongs three and four of the *O'Brien* test in its application in *Clark v. Community for Creative Non-Violence.* [75] The Court in *CCNV* prohibited a "tent city" demonstration for the homeless in Lafayette Park and on the Mall in Washington, D. C.[76] In upholding the ban on camping and sleeping in the public areas, the Court in *CCNV* re-phrased the *O'Brien* test.[77] The *CCNV* version of the *O'Brien* test required that the law be "justified *without reference* to the *content* of the regulated speech,"[78] not that the government's regulatory interest be "*unrelated* to the suppression of free expression."[79] The Court in *CCNV* also moved away from *O'Brien*'s requirement that the restriction on speech be "no greater than is essential."[80] The *CCNV* test required only that the law "leave open *ample alternative channels* for communication of the information."[81]

Four years later, in *Boos v. Barry,*[82] the Court reinvigorated the *O'Brien* test. In *Boos*, the Court said that only when "justifications for regulation *have nothing to do with content* . . . [have] we concluded that the regulation was properly analyzed as content-neutral."[83] In holding that the ban on picketing outside foreign embassies was unconstitutionally content based, the Court said content neutrality requires more than mere viewpoint neutrality.[84]

> Rather, [the Court] held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the First Amendment's hostility to content-based regulation extends . . . to prohibition of public

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the law has a "potent viewpoint-differential impact").

74. *Id.*
75. 468 U.S. at 293.
76. *Id.* at 289.
77. *Id.* at 293.
78. *Id.* (emphasis added).
79. *O'Brien*, 391 U.S. at 377 (emphasis added).
80. *Id.*
81. *CCNV*, 468 U.S. at 293 (emphasis added).
82. 485 U.S. 312.
83. *Id.* at 320 (emphasis added).
84. *Id.* at 319.

discussion of an entire topic.[85]

While *Boos* affirmed the principle that strict scrutiny should be applied to any laws that more than incidentally and neutrally affect protected speech, the Court's 1989 ruling in *Ward v. Rock Against Racism* changed course.[86] In *RAR,* the Court upheld a city rule mandating that city employees control the volume and mixing of performances in New York City's Central Park band shell as a reasonable, content-neutral regulation of place and manner.[87] The Court held that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of *disagreement with the message* it conveys."[88] In *O'Brien*, however, the Court had required that the regulation be "*unrelated* to the suppression of free expression."[89]

The *RAR* Court also said content-neutral regulations "need not be the least restrictive or least intrusive means" of advancing the government's "legitimate" interest.[90] Rather, narrow tailoring under the *RAR* standard means only that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[91] It is this twisting of *O'Brien* that has since controlled the Court's application of intermediate scrutiny to content-neutral regulations of protected speech.

For example, in 1990, the Court upheld as content neutral a ban on in-person soliciting outside post offices.[92] In *United States v. Kokinda*, the Court looked *not* at any potential disproportionate effect of the ban but at "the inherent [disruptive] nature of solicitation itself" and at the *intent* of the postal service policy.[93] The postal service's "concern about losing customers because of the potentially unpleasant situation created by solicitation," without more, simultaneously justified the ban and established its content

85. *Id.* (rejecting argument that demonstration that a law is not viewpoint-based is sufficient to establish that it also is content-neutral) (quoting *Consol. Edison Co. v. Pub. Serv. Comm.*, 447 U.S. 530, 537 (1989)).

86. 491 U.S. 781 (1989) [hereinafter RAR].

87. *Id.* at 803.

88. *Id.* at 791 (emphasis added).

89. 391 U.S. at 377 (emphasis added).

90. 491 U.S. at 798.

91. *Id.* at 799.

92. *Kokinda*, 497 U.S. at 737.

93. *Id.* at 736.

neutrality.[94] "Nothing suggests the Postal Service intended to discourage one viewpoint and advance another," the Court said.[95] "[Rather,] by excluding all . . . groups . . . the Postal Service is not granting to one side of a debatable public question . . . a monopoly in expressing its views."[96] The absence of a monopoly grant, it seems, was tantamount to content neutrality. The Court was unswayed by the likelihood that certain groups or ideas would be more likely to attempt to express their views through such direct solicitation.

In subsequent cases, the Court focused on legislative intent to determine the content neutrality of laws.[97] In 1992, in *Simon & Schuster v. New York State Crime Victims Board,* the Court used illicit legislative intent to strike down a state law imposing financial burdens on the speech of certain criminals.[98] A year later, in *Cincinnatti v. Discovery Network,* the Court found that a facially neutral city ban on commercial newsracks served to disguise an unconstitutional content-based intent.[99]

Then, the plurality of the Court, in its 1994 *Turner I* opinion, defined content-neutral regulations largely by what the legislature does *not* intend to do.[100] Acknowledging that it "is not always a simple task" to determine the content neutrality of a law, the Court said federal rules requiring cable operators to carry local broadcast programming were content neutral.[101] The Court said a law is content neutral so long as government does not intend to punish communication based on government "agreement or disagreement with the message it conveys," or to "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[102]

In *Turner I,* the Court also relaxed the narrow tailoring requirement of the *O'Brien* test to require only that a "substantial portion of the burden on speech . . . advance the [s]tate's content-neutral goals."[103] Applying that standard three years later, the Court in *Turner II* rejected any need to examine regulatory alternatives to

94. *Id.* (emphasis added).
95. *Id.*
96. *Id.* (internal citations and quotations omitted).
97. *See e.g. Discovery Network*, 507 U.S. 410; *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1992).
98. 502 U.S. at 117.
99. 507 U.S. at 429.
100. 512 U.S. at 643.
101. *Id.* at 642, 652.
102. *Id.* at 642-43.
103. *Id.* at 682.

demonstrate "fit."[104] The Court stated, "Our cases establish that content-neutral regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech" or "because some alternative solution is marginally less intrusive on a speaker's First Amendment interests."[105] *Turner II* transformed the *O'Brien* requirement that the law's infringement on free speech be "no greater than is essential"[106] to require only that the governmental interest "would be achieved less effectively absent the regulation."[107] To determine this, however, the Court need neither closely examine "the logic of the regulatory scheme" nor decide whether the government might achieve its goals through less speech-intrusive means.[108]

In contrast to the majority opinion, Justice O'Connor dissented sharply in *Turner I,* stating that the must-carry rules were based on an impermissible content distinction in which "the government . . . decide[s] who may speak and who may not."[109] In looking to the effect of the law, Justice O'Connor stated, "Laws that single out particular speakers are substantially more dangerous [than laws of general application], even when they do not draw explicit content distinctions."[110] Moreover, Justice O'Connor said, "benign motivation" cannot reduce the scrutiny of laws that "make reference to content [even though] [t]hey may not reflect hostility to particular points of view, or a desire to suppress certain subjects."[111]

When the case returned to the Court three years later, in *Turner II,* Justice O'Connor noted that fear of anticompetitive behavior does not provide a content-neutral basis for sustaining a law that discriminates among speakers.[112] The plurality of the Court, however, reaffirmed its reasoning that, regardless of their disparate impact, laws intended to reduce market power and improve citizen access to diverse information sources are content neutral, and need survive only the *O'Brien* test of intermediate scrutiny.[113]

104. 520 U.S. at 217.
105. *Id.* at 217, 218.
106. *O'Brien*, 391 U.S. at 377.
107. *Turner II*, 520 U.S. at 213 (quoting *RAR*, 491 U.S. at 799).
108. *Id.* at 249 (O'Connor, J., dissenting).
109. *Turner I*, 512 U.S. at 676 (O'Connor, J., dissenting in part and concurring in part).
110. *Id.*
111. *Id.* at 677.
112. *Turner II*, 520 U.S. at 235 (O'Connor, J., dissenting).
113. *Id.* at 186.

IV
O'Brien – The Decline of Media Freedom

In *Turner I* and *Turner II*, the United States Supreme Court applied a distorted *O'Brien/RAR* intermediate scrutiny test to uphold federal laws requiring cable operators to carry broadcast television stations.[114] In both decisions, the Court refused to delineate the First Amendment status of cable broadcasting, but reiterated that mere distinctions among media rarely dictate strict scrutiny.[115] The Court in *Turner I* emphasized that since content-neutral laws do not present the same "inherent dangers to free expression" as do content-based regulations, they are subject to less rigorous analysis by the Court.[116] Turning the content-neutral test on its head, the Court further held in *Turner I* that a content-neutral purpose may be *presumed* when extensive legislative fact-finding exists and fails to demonstrate governmental favor or disfavor with the content being affected.[117]

Despite upholding the must-carry provisions as constitutional, the Court could not muster a majority to agree upon the government's content-neutral purpose for the regulations.[118] The plurality of the Court held that it must defer to Congress's judgment "so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination."[119] The *Turner II* plurality deferred to Congress to determine both the reality of the problem to be addressed by the must-carry laws and the magnitude of the problem that "justified enactment of the must-carry provisions."[120] Congress's conclusion that the law was necessary to prevent cable systems from dropping some broadcasters and endangering some over-the-air programming was proof, according to the plurality opinion, that the must-carry laws were reasonable.[121] On this basis, the *Turner II* plurality opinion said

114. 512 U.S. at 637, 668; 520 U.S. at 213-14.

115. *Turner I*, 512 U.S. at 637; *Turner II*, 520 U.S. at 189-90; *see also FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring); *Assoc. Press v. U.S.*, 326 U.S. 1, 20 (1945) (establishing that distinct regulation tailored to the unique characteristics of any medium is not facially suspect).

116. 512 U.S. at 661.

117. *Id.* at 642.

118. *Turner II*, 520 U.S. at 185, 195-98.

119. *Id.* at 224. This "reasonable" standard echoes the language of rational review traditionally applied by the Court to laws that do not infringe constitutional protections.

120. *Id.* at 196.

121. *Id.* at 201-02.

the law was a significantly important, content-neutral, "'industry-specific antitrust and fair trade'" provision "'designed to prevent cable operators from exploiting their economic power to the detriment of broadcasters.'"[122] Then, in lieu of analysis, the principal opinion of the Court simply asserted that "it [is] apparent [that] must-carry serves the government's interests 'in a direct and effective way.'"[123]

In his crucial concurrence, Justice Breyer expressly rejected the plurality's content-neutral basis for the must-carry law and said the law clearly infringed the First Amendment freedoms of both cable operators and non-broadcast programmers.[124] Instead, Justice Breyer asserted that the government's "sufficient basis" for the must-carry laws was its interest in advancing "a rich mix of over-the-air programming" and its desire "to prevent too precipitous a decline in the quality and quantity of programming choice."[125] Justice Breyer said promotion of a multiplicity of voices was a "governmental purpose of the highest order," but he upheld the must-carry laws without analyzing whether this stated purpose was either content-neutral or only incidentally related to speech, as required by *O'Brien*.[126]

V

Central Hudson — Commercial Speech Standards

As these Supreme Court rulings lowered the bar against regulations that infringe the First Amendment rights of media,[127] several roughly contemporaneous opinions raised the constitutional bar against regulation of speech related to commercial activities.

Originally, the Court shunned truthful commercial speech as irrelevant to the exchange of ideas protected by the First Amendment.[128] The Court also avowed the constitutionality of laws that punished false or fraudulent commercial messages to protect the strong consumer interest in informed consumer choice.[129] Then in

122. *Id.* at 186 (quoting *Turner Broad. Sys. v. FCC*, 819 F. Supp. 32, 40 (D.D.C. 1993)); *see also Turner I*, 512 U.S. at 649.

123. *Turner II*, 520 U.S. at 213 (quoting *RAR*, 491 U.S. at 800).

124. *Id.* at 225 (Breyer, J., concurring).

125. *Id.* at 225-26.

126. *Id.* at 227 (internal citation omitted).

127. *Id.* at 180; *Turner I*, 512 U.S. 622.

128. *Valentine v. Chrestensen*, 316 U.S. 920 (1942); *Breard v. Alexandria*, 341 U.S. 622 (1951).

129. *See* Kozinski & Banner, *The Anti-History and Pre-History of Commercial*

1975, in *Bigelow v. Virginia,* the Court asserted that truthful commercial speech enjoyed some First Amendment protection because it contributed value to the marketplace of ideas.[130] The following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* the Supreme Court struck down a Virginia state ban on drug price ads.[131] In reaching their decision, the Court relied heavily on the analysis provided in previous decisions regarding First Amendment protection of political speech.[132] *Virginia Board* headed a line of cases in which the Court said the First Amendment prohibited advertising bans unrelated to consumer protection.[133]

These rulings, however, suggested that government could regulate commercial advertising "in a variety of ways and for a variety of reasons" far more easily than it could censor other forms of protected speech.[134] The Court stated that "common sense differences" between commercial and noncommercial speech, the greater ease of assessing the falsity of "objective" commercial speech claims, and the increased "hardiness" that the profit motive instilled in commercial speech all justified lesser scrutiny of intrusive government regulation of commercial speech than of other protected speech.[135] The Court said the power to regulate commercial speech also arose from the inextricable link between that speech and regulable commercial transactions.[136]

By 1980, however, a majority of the *Central Hudson* Court required the government to show that its interest in constraining commercial speech could not be advanced through regulations less harmful to speech interests.[137] Rejecting strict scrutiny of a New York ban on advertising by electrical utilities, the Court established a four-part test in *Central Hudson* to determine when regulation of

Speech, 71 Tex. L. Rev. 747 (1993).

130. 421 U.S. 809.

131. 425 U.S. at 773.

132. *Id.* at 761-62 (citing cases such as *N.Y. Times Co.*, 376 U.S. 254, *Smith v. Cal.*, 361 U.S. 147 (1959), *Roth v. U.S.*, 354 U.S. 476 (1957), and *Chaplinsky v. N.H.*, 315 U.S. 568 (1942)).

133. *See e.g. Central Hudson*, 447 U.S. 557; *Bates v. St. Bar of Ariz.*, 433 U.S. 350 (1977); *Carey v. Population Serv. Intl.*, 431 U.S. 678 (1977); *Linmark Assoc. v. Willingboro*, 431 U.S. 85 (1977).

134. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring).

135. *Id.* at 498 (citing *Bates*, 433 U.S. 350).

136. *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio St. Bar Assn.*, 436 U.S. 447 (1978); *see e.g. Posadas*, 478 U.S. at 345-46 (expressly upholding a ban on casino gambling advertising).

137. *Central Hudson*, 447 U.S. at 566.

commercial speech violated the First Amendment.[138] To fall under the First Amendment, commercial speech "must concern lawful activity and not be misleading."[139] Once this hurdle is cleared, the burden shifts to government to demonstrate that:

1) its regulatory "interest is substantial,"
2) the regulation "directly advances the governmental interest," and
3) the regulation is "not more extensive than necessary."[140]

In *Central Hudson*, the Court said this intermediate level of scrutiny was justified because the lesser value of commercial speech did not warrant strict scrutiny protection.[141] The *Central Hudson* test has dominated commercial speech jurisprudence for the past twenty years.[142]

The Court and numerous scholars have suggested that this test is virtually indistinguishable from the *O'Brien* test.[143] For that reason among others, the Court has been castigated for its distinction between commercial and non-commercial speech[144] and for its inconsistent rulings in the area of commercial speech.[145] In particular, the Court's application of the *Central Hudson* test to cases involving "vice" advertising has generated special concern among scholars.[146]

The key to the debate is the Court's 1986 decision in *Posadas de*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 573.

142. Note that the Court might have easily applied *O'Brien* on the grounds that commercial speech regulations are designed to restrict the commercial, nonspeech component of the message.

143. *See e.g. Central Hudson*, 447 U.S. at 376-77; *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 n. 16 (1987) (calling the two tests "substantially similar"); *Fox*, 492 U.S. at 478 (calling the tests "similar"); Dana Grantham Lennox, *Note: Hello, Is Anybody Home? Deregulation, Discombobulation, and the Decision in U.S. West v. FCC*, 34 Ga. L. Rev. 1645, 1700 (2000); R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S.U. L. Rev. 1, 34 (1995) (referring to "tortured" distinction among tests of mid-level review); Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. Rev. 131, 174 (1989); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 Mo. L. Rev. 55, 141 (1999).

144. *See e.g.* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale L.J. on Reg. 85, 88-90 (1999).

145. *See e.g.* Phillip B. Kurland, *Posadas de Puerto Rico: "'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 S. Ct. Rev. 1 (1986).

146. *See e.g.* Hoefges & Rivera-Sanchez, *supra* n. 5, at 347.

Puerto Rico Associates v. Tourism Company of Puerto Rico.[147] In what has been called "the Court's most lenient application of intermediate scrutiny,"[148] a 5-4 majority of the Court deferred to the interests of the Puerto Rican legislature to uphold a ban on ads for legalized casino gambling that targeted the Puerto Rican public.[149] In addition to the established rationale that commercial speech warrants only reduced constitutional protection, the Court in *Posadas* reasoned that 1) bans on advertising of "vice" activities are subject to even lesser scrutiny and 2) the governmental ability to ban a commercial activity carries with it the collateral ability to ban speech about that activity.[150]

A 1993 ruling upholding part of a ban on broadcast state lottery advertisements extended this logic. In *United States v. Edge Broadcasting Co.,* the Court said "it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech."[151] The Court voted 7-2 that a ban on lottery ads in non-lottery states was a "reasonable" means to "directly" protect the policies of both lottery and non-lottery states.[152]

VI
The "Most Recent" Commercial Speech Cases

In marked contrast with *Posadas* and *Edge*, the Court in 1996 unanimously struck down a state ban on price advertising for alcohol in *44 Liquormart, Inc. v. Rhode Island.*[153] In so doing, the Court directly attacked previous rationales that justified reduced constitutional protection of commercial speech.[154] The Court increased the vigor of the *Central Hudson* standard to overturn the ban at issue in *44 Liquormart* and said *Central Hudson*'s intermediate scrutiny was insufficiently "rigorous" when the state's interest in regulating commercial messages "is [in]consistent with the reasons for according constitutional protection to commercial speech."[155]

147. 478 U.S. at 337-44.
148. Hoefges & Rivera-Sanchez, *supra* n. 5, at 361.
149. *Posadas*, 478 U.S. at 355.
150. *Id.* at 361.
151. *Edge Broad. Co.*, 509 U.S. at 430.
152. *Id.* at 426, 428-29.
153. 517 U.S. at 501.
154. *Id.*
155. *Id.*

> Regulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference.[156]

Indeed, the Court said, "[T]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[157]

The Court flatly rejected as erroneous its *Posadas* analysis.[158] The *44 Liquormart* opinion said the *Posadas* decision to uphold a ban on gambling advertisements was too deferential to legislative discretion.[159] The Court said *Posadas* had reasoned incorrectly that the legislature was free to choose whether to suppress truthful, nonmisleading commercial messages rather than regulate the targeted commercial behavior.[160] "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are *more* dangerous than attempts to regulate conduct," the *44 Liquormart* Court said.[161]

Instead of blind deference, the standard established by the Court in *44 Liquormart* requires an evaluation of a ban's effectiveness and an examination of alternatives to determine a ban's constitutionality.[162] To do this, the Court must leave "some room for the exercise of legislative judgment"[163] while assuring that the regulation is "no more extensive than necessary."[164] A properly crafted regulation is not "ineffective or remote" from its objective and "directly advances"[165] its purpose "to a material degree" or "significantly."[166]

Additionally, Justice O'Connor argued in a lengthy concurrence that rather than "accept at face value the proffered justification" for

156. *Id.* at 502 (internal citations omitted).
157. *Id.* at 503 (plurality) (internal citations omitted).
158. *Id.* at 509.
159. *Id.* at 510.
160. *Id.* at 509.
161. *Id.* at 512 (emphasis added).
162. *Id.* at 507.
163. *Id.* at 508.
164. *Id.* at 507.
165. *Id.*
166. *Id.* at 505.

regulation of lawful commercial speech, the Court must engage in a "searching" examination of the regulation's fit with the government's asserted goals.[167] The necessary "fit between the legislature's goal and method" need not be "perfect" or the "single best disposition" or "the least restrictive means," according to O'Connor.[168] Rather, the fit must be "reasonable," "in proportion to the interest served," "narrowly tailored," and "reasonably . . . targeted to address the harm intended to be regulated."[169] Regulations of commercial speech are more likely to be reasonable if the government has conducted a "careful calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition;" if there are no "less burdensome alternatives to reach the stated goal;" and "if alternative channels permit communication of the restricted speech."[170]

This stringent application of the *Central Hudson* test foreshadowed the Court's 1999 unanimous decision to strike down part of a federal ban on broadcast ads for casino gambling. In *Greater New Orleans Broadcasting Association v. United States,*[171] the United States Supreme Court used "*Central Hudson, as applied in [its] most recent commercial speech cases,*" to unanimously reject the right of the Federal Communications Commission to prohibit broadcast ads for privately operated casinos.[172] The Court rigorously applied the *Central Hudson* test and ruled unconstitutional the federal ban on ads for private casinos in states where such gambling was legal. [173] The Court said the broadcast audience, not the government, should determine the value of these truthful advertisements.[174]

Justice Thomas concurred with the majority's holding. However, Justice Thomas argued that *all* government regulations intended "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace" are "*per se* illegitimate."[175] Chief Justice Rehnquist, who once castigated the Court for elevating commercial expression between a buyer and a seller to "the same plane as . . . the free marketplace of ideas,"[176]

167. *Id.* at 531 (O'Connor, J., concurring).
168. *Id.* at 529 (O'Connor, J., concurring).
169. *Id.*
170. *Id.* (internal citations omitted).
171. 527 U.S. 173.
172. *Id.* at 184 (emphasis added) (provisions explicitly exempt state-operated lotteries, government gambling operations, and tribal casinos from the ban).
173. *Id.* at 195.
174. *Id.*
175. *Id.* at 197 (Thomas, J., concurring in judgment).
176. *Va. St. Bd. of Pharm.*, 425 U.S. at 781.

concurred with the opinion.[177]

In *Greater New Orleans*, the Court expressly rejected fundamental premises of its *Posadas* reasoning and deference.[178] The Court directly rejected any notion of reduced protection for "vice" advertising.[179] The Court also rejected dicta that the "greater" power to regulate commercial conduct necessarily includes the "lesser" power to regulate speech about that conduct.[180]

The Court failed to further consider whether broadcast speech warranted reduced First Amendment protection.[181] Instead, the Court in *Greater New Orleans* carefully examined the intent, the application, and the broad "regulatory scheme"[182] of the federal government and decided that the government's interest was far from clear; the harm to be addressed was uncertain; the ban's efficacy was undemonstrated; and the regulatory strategy was "so pierced by exemptions and inconsistencies that the government [could not] hope to exonerate it."[183] Moreover, the Court said the law was not appropriately tailored because "practical and nonspeech-related forms of regulation [were readily identifiable] . . . that could *more directly and effectively* alleviate some of the social costs of casino gambling."[184] Although the Court said regulation of truthful commercial speech "may incidentally, even deliberately, restrict a certain amount of speech not thought to contribute significantly to the dangers with which the government is concerned," such regulation must, at a minimum, provide "a rough approximation of efficacy [or] a reasonable accommodation of competing State and private interests."[185]

The Court also held that the "[g]overnment [had] present[ed] no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos."[186] When a law distinguishes among information based on the identity of the speakers, the Court said government must provide "sound reason[s] why such lines *bear any meaningful relationship to the particular*

177. *Greater New Orleans*, 527 U.S. at 196-97 (Rehnquist, C.J., concurring). Three years earlier, he also concurred with the Court's opinion in *44 Liquormart*, 517 U.S. 484.

178. *Id.* at 182.

179. *Id.*

180. *Id.* at 183-94 (referencing *Posadas*, 478 U.S. at 345-346).

181. *Id.* at 184 (equating broadcast messages generally with protected commercial speech).

182. *Id.* at 182-92.

183. *Id.* at 190.

184. *Id.* at 192 (emphasis added).

185. *Id.* at 194.

186. *Id.* at 191.

interest asserted.... [D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."[187]

VII
Intermediate Scrutiny in the '90s

In *44 Liquormart* and *Greater New Orleans,* the Court established a rigorous standard of mid-level review of laws to strike down bans on certain types of commercial speech. At the same time, the *Turner I* and *II* decisions employed a relaxed standard of intermediate review to uphold a federal law requiring cable operators to carry broadcast stations.[188] In the two commercial speech cases, the Court demanded that the government justify its intrusion into the freedom of speech of those seeking to advertise alcohol and gambling.[189] In the two *Turner* decisions, the Court accepted the economic value of the regulation and brushed aside concern for the free speech rights of cable operators and non-broadcast content providers.[190]

The heart of the distinction between the commercial speech and the cable rulings lies in the Court's definition and application of intermediate level scrutiny. The *Greater New Orleans* ruling is the logical extension of seven Supreme Court decisions since *Posadas* that apply increasingly rigorous intermediate scrutiny to non-consumer protection-oriented regulations of commercial speech.[191] The *Turner* decisions culminate a separate and disparate trend: the Court's increasingly deferential and relaxed application of intermediate scrutiny to content-neutral laws that restrict non-commercial speech.[192]

187. *Id.* at 194 (emphasis added).

188. 520 U.S. 180; 512 U.S. 622.

189. *Id.*

190. *Id.*

191. *Greater New Orleans*, 527 U.S. at 181-84 (noting that "[p]artly because of [*Central Hudson's*] intricacies, petitioners as well as certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."); *see Glickman*, 521 U.S. 457; *44 Liquormart*, 517 U.S. 484; *Coors Brewing Co.*, 514 U.S. 476; *Edenfield v. Fane*, 507 U.S. 761 (1993); *Discovery Network*, 507 U.S. 410; *Edge Broad. Co.*, 509 U.S. 418; *Fox*, 492 U.S. 469.

192. *Turner I*, 512 U.S. 622; *Turner II*, 520 U.S. 180.

VIII
The Seeds of Doctrinal [R]Evolution

The recent Supreme Court decisions elevating the protection of commercial speech build upon abundant language from earlier commercial speech rulings. For more than two decades, members of the United States Supreme Court have argued that any systematic reduction of First Amendment protection should be limited to that narrow subset of commercial speech that is more likely to deceive or to manipulate consumer choices.[193]

In the past five years, the minority language of Justice Blackmun has come to dominate and direct commercial speech jurisprudence. In fact, Chief Justice Rehnquist, once the most outspoken proponent of rigid limits on the protection of commercial speech, joined both the *44 Liquormart*[194] and *Greater New Orleans*[195] opinions. In *Central Hudson*, then-Justice Rehnquist argued vehemently in his dissent that the Court's "fail[ure] to give due deference to th[e] subordinate position of commercial speech ... effectively accomplished the devitalization of the First Amendment."[196] Yet, not a single justice in the two most recent decisions supported that broad subordinate position doctrine for commercial speech. To the contrary, Justice Thomas argued that the First Amendment dictates that many, perhaps most, commercial speech bans are *per se* unconstitutional.[197]

The Court's revisioning of content-neutral regulation of non-commercial speech rests on thinner precedent. Rather than building from concurrences and dicta within majority opinions, the expanded and relaxed application of *O'Brien* intermediate scrutiny stands First Amendment law on its head. Nearly half a century ago, Justice Frankfurter made clear that the First Amendment dictates that "a legislature [may] not prescribe what ideas may be noisily

193. *See e.g. Edge Broad. Co.*, 509 U.S. at 494; *see also Va. St. Bd. of Pharm.*, 425 U.S. at 761; *Ohralik*, 436 U.S. at 477 (Rehnquist, J., concurring) ("Additional restrictions [or commercial speech] can be justified only to the degree that dangers which the State has a right to prevent are actually presented by conduct attendant to such speech."); *Discovery Network*, 507 U.S. at 431, 436 (Blackmun, J., concurring) ("[I]ntermediate scrutiny is [not] appropriate ... for a regulation that suppresses truthful commercial speech;" "truthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection."); *Coors Brewing Co.*, 514 U.S. at 494.

194. 517 U.S. at 528 (Rehnquist, C.J., concurring).

195. 527 U.S. at 196 (Rehnquist, C.J., concurring).

196. 447 U.S. at 589, 591.

197. *See e.g. Greater New Orleans*, 527 U.S. at 197 (Thomas, J., concurring); *Glickman*, 521 U.S. at 504 (Thomas, J., dissenting); *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and in judgment).

expressed . . . nor discriminate among those who would make inroads upon the public peace."[198] Yet, the Court since has moved away from the clear determination of whether a law discriminates among ideas or speakers as the basis for its decisions. Instead, the Court has attempted to assess the permissibility of the legislature's motive for "singl[ing] out certain ideas for repression."[199] By 1984, a majority of the Court would refuse to provide the most stringent First Amendment review of a ban on public assembly because the ban was "not being applied because of disagreement with the message presented."[200]

In recent years, it has fallen to dissenting justices to argue "that government agencies by their very nature are driven to overregulate . . . to the detriment of First Amendment rights, [and] that facial viewpoint neutrality is no shield against unnecessary restrictions on unpopular ideas or modes of expression."[201] Indeed, in at least one speech ruling in the 1990s, the principal opinion of the Court argued that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature *intends* to suppress certain ideas."[202] In *Turner I* and *II*, content neutrality came to mean anything that did not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[203] The Court in *Turner* has wandered a long way from the historical position that viewpoint neutrality is irrelevant to content neutrality and that content neutrality requires that a law be *unrelated* to content.

IX
Significance

These two sets of cases suggest a marked transformation of established First Amendment protections.[204] Indeed, taken together,

198. *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949); *but see Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 803 (1996) (Thomas, J., concurring in the judgment in part, dissenting in part) ("It contravenes the First Amendment to give government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.").

199. *Denver Area*, 518 U.S. at 771 (Stevens, J., concurring).

200. *CCNV*, 468 U.S. at 294-95.

201. *Id.* at 315-16 (Marshall, J., dissenting).

202. *Discovery Network*, 507 U.S. at 429 (emphasis added) (internal citations omitted).

203. *Turner II*, 520 U.S. at 186 (internal citations omitted).

204. *See e.g.* R. Michael Hoefges, *The Current Constitutional Landscape for Commercial Speech: Implications for Color and Imagery in Tobacco Advertising*, unpublished paper presented to 1997 AEJMC Convention, Chicago; Sigman L. Splichal,

they challenge standards that long have provided points of light in the penumbral body of First Amendment jurisprudence. They suggest a re-definition and revised application of intermediate scrutiny that challenges the axiom that commercial speech enjoys less First Amendment protection than does noncommercial speech.[205]

The recent Unite States Supreme Court rulings on commercial speech suggest a new respect for the value of commercial speech in the marketplace of ideas. Today "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis."[206] Rather, the Court has determined that most advertising regulation should be subjected to something close to strict scrutiny. In evaluating laws that regulate truthful commercial messages, the Court does not defer to legislative findings but engages in a searching examination of the law's "fit" and effectiveness. Evidence of less speech-intrusive alternatives demonstrates a poor legislative fit and generally renders a law unconstitutional.

The same is not true of the Court's rulings on laws that affect media autonomy or speech. In the eleven years since *RAR*,[207] the Court has distorted the definition of content neutrality to permit government regulation relating to content and distinguishing among speakers when the legislative motive is "pure." The Court has erased its established "bright-line rule [that] any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction."[208] Instead, the Court now defines as content-based only those laws motivated by expressed governmental agreement or disagreement with the message conveyed.[209]

The Court has also rejected the least-intrusive-means test and

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Matthew D. Bunker & J. Brian O'Loughlin, *First Amendment Scrutiny and Commercial Speech: Raising the Bar for Regulating Advertising of Lawful Products*, unpublished paper presented to 1997 AEJMC Convention, Chicago; Mark Tushnet, *New Meaning for First Amendment: Free speech may be seen as a tool for protecting those in power*, 81 ABA J. 56 (Nov. 1995).

205. *See e.g. Central Hudson*, 446 U.S. at 562-63 (defining commercial speech as of "less constitutional moment"); *but see e.g. 44 Liquormart*, 517 U.S. at 526-27 (calling the *Central Hudson* test an effort "to weigh incommensurables" and noting that "[t]he courts, including this Court, have found the *Central Hudson* 'test' to be, as a general matter, very difficult to apply with any uniformity. This may result in part from the inherently nondeterminative nature of a case-by-case balancing 'test' unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test."); *see also id.* at 527 n. 8 and n. 9.

206. *44 Liquormart*, 517 U.S. at 501.

207. 491 U.S. 781.

208. *Boos*, 485 U.S. at 335-36 (Brennan, J., concurring in part).

209. *Turner I*, 512 U.S. at 642 (citing *RAR*, 491 U.S. at 791).

refrained from determining the differential impact of regulatory options, to decide whether a speech-related, content-neutral law is properly tailored to the governmental goal. In place of an exacting calculus of costs and benefits, the Court has deferred to legislative record. Rather than require the government to demonstrate with convincing evidence the necessity and fitness of the law, the Court asks the offended party to prove that the law is motivated by illicit intent.

This trend departs radically from a century of Court precedents that interpret the First Amendment to dictate that "Congress shall make no law . . . abridging the freedom of speech, or of the press"[210] in order to require that the vast majority of speech-intrusive laws undergo the most stringent scrutiny. In fact, the principal opinion in *Turner II* suggests this trend may go even further: today the Court may apply more exacting analysis to purely economic or structural provisions than it does to speech-related laws labeled content-neutral.[211] In *Turner II* the Court held that while antitrust law "requires courts to delve deeply into the theory of economic organization,"[212] review of content-neutral infringements on First Amendment speakers requires the Court "simply to determine if . . . the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress."[213] It is unclear how this latter standard differs significantly, if at all, from rational review.

210. U.S. Const., amend. I.

211. *Turner II*, 520 U.S. at 208. ("This is not a case in which we are called upon to give our best judgment . . . as we would in a case arising, say, under the antitrust laws. . . . We need not put our imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment.").

212. *Id.* at 207 (internal cite omitted).

213. *Id.* at 195, 211.

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Conclusion

Taken together, the shifts in commercial speech jurisprudence and the misapplication of intermediate scrutiny standards[214] reverse traditional free speech values. These decisions blur the few bright-line rules that delineated commerce from free expression, collapsing speech categories and contorting tests to ravage established First Amendment doctrines. In the place of clear jurisprudence, the United States Supreme Court rulings of the late 1990s offer little beyond biting rhetoric and a Court deeply divided in its views.

214. *Id.* at 229, 258 (O'Connor, J., dissenting).